



## AGENDA REPORT

**Meeting Date:** January 5, 2016

**Item Number:** G-1

**To:** Honorable Mayor & City Council

**From:** Carol Lynch, Assistant City Attorney

**Subject:** REPORT ON PARCELS 12 & 13

**Attachments:**

- A. Letter to the City From Rincon Consultants, Inc., Regarding Arsenic Toxicity dated December 4, 2015
- B. A Report on Off-site Samples of Dirt taken from Civic Center Drive
- C. A Report on Shallow Soil Samples Taken From Parcels 12 & 13
- D. A Map Depicting the Rincon Testing Locations of Shallow Soils Taken on and Off-Site
- E. Beverly Hills Arsenic Monitoring Memorandum From PCR dated December 8, 2015.

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### INTRODUCTION:

The purpose of this report is to provide information to the City Council and the public about the removal of trees and vegetation from Parcels 12 and 13, which occurred on November 21<sup>st</sup> and 22<sup>nd</sup>. Following the removal of the trees, the City Manager directed the City Attorney's Office and City Staff to review what happened, analyze any mistakes that were made, and make recommendations for how City systems and procedures can be improved. It is important to note that Staff's primary goal following the removal of the trees was to protect the public health and the safety of residents, businesses, and individuals who attended the Farmers' Market, and that Staff's actions accomplished that goal.

In summary, the mistakes that were made were:

1. Staff was aware that many trees are located within the City's street right-of-way for Civic Center Drive, which is the southern twenty feet of Parcel 13. Because Staff was aware of the location of that right-of-way, Staff also knew that the trees within that right-of-way are owned by the City. Accordingly, none of those trees have been removed, and a public process will be followed prior to any tree removal.

However, not all Staff members were aware that there also is an approximately two-foot wide strip of street right-of-way along the north side of Parcels 12 and 13. Many of the trees that were removed were located partially within this strip of City street right-of-way and partially on the privately-owned portions of the Parcels. Staff also were not aware of the state law that governs the ownership of trees and that if a tree trunk is located on two separate parcels, the owners of the two parcels both own the tree. As a result, some Staff members incorrectly believed that all of the trees on the northern portion of the parcels were privately owned, and the City's standard process of providing public notification and receiving input prior to removal of those trees did not occur.

2. In reacting to the inherent pressure to respond quickly to public inquiries about the tree removal, the incorrect assumption that all of the trees that had been removed were privately owned was communicated by City Staff to the public and the press.
3. When a member of the public called the Community Development Department on Monday morning, November 23<sup>rd</sup>, to inquire if permits had been issued to remove the trees, he was incorrectly told that permits had been issued by the City, when that was not the case.
4. More complete information about the removal process should have been provided in writing to the California Department of Toxic Substances Control ("DTSC"), and written concurrence with the process should have been obtained from DTSC, so that the record about what DTSC had authorized would have been clear.
5. West Coast Arborists should have obtained a right-of-way use permit to close a lane on Santa Monica Boulevard and an after-hours work permit to conduct the work on Saturday and Sunday.

City Staff and the City Attorney's Office have conducted numerous meetings regarding this matter and make the following recommendations to address the mistakes that were made:

1. The first, second and third mistakes can be corrected by: (a) improving communications among the City's departments, especially when more than one department is involved with a project; (b) developing a more comprehensive data base so that key information about City-owned properties, including street rights-of-way, is readily available to all of the City's departments; (c) the data base for each City-owned property, including street rights-of-way, should include all relevant information, including the presence of easements, trees, City infrastructure, maintenance agreements, and contamination; (d) training Staff in all City Departments about the data base, so they can access the information in connection with making decisions or recommendations that affect City properties; and (e) designating one person/position as a the point of contact or liaison with regard to activities on Parcels 12 and 13.
2. Staff understands that there is a balance between the need to provide timely information to the public and the important goal that the information be accurate. Thus, Staff should release information that has been verified as soon as possible, but information should not be provided that is based on unverified assumptions.
3. The fourth mistake has been addressed. The City Manager already has directed Staff to obtain written confirmation from DTSC of any approval or authorization to conduct future work on properties in the City that are contaminated.

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4. The last mistake also has been addressed. On December 14, 2015, the Deputy Building Official sent a letter to West Coast Arborists reprimanding them for not obtaining the permits from the City that were required for the work that was performed, including a permit to work after-hours and a permit to allow the closure of parking or traffic lanes.

## **BACKGROUND**

### **Location, Ownership and Zoning of Parcels 12 and 13:**

Parcels 12 and 13 (which are referred to either as “the Parcels” or “the Property”) are located in the area between Santa Monica Boulevard and Civic Center Drive. Together, they comprise approximately five acres and currently are vacant. The Parcels are privately owned by the Beverly Hills Land Company (“BHLC”) and are zoned for transportation uses.

Portions of the City’s street rights-of-way for Santa Monica Boulevard and Civic Center Drive are located on the Parcels. Approximately two feet of the Santa Monica Boulevard street right-of-way is located on the north side of both Parcels. Approximately two feet of the Civic Center Drive right-of-way is located on the south side of Parcel 12, and approximately twenty feet of that street right-of-way is located on the south side of Parcel 13.

### **Historical Background Regarding the Contaminated Soil on the Parcels:**

The Parcels previously were owned by a predecessor to Union Pacific Rail Road (“UPRR” or “Union Pacific”) and were utilized as a railroad right-of-way. That historic use caused arsenic to be deposited on soil that is located on the Parcels. In 1998, Union Pacific sold the Property to its current owner, BHLC, although Staff has been advised by legal counsel for the property owner that the ownership of BHLC was transferred in December 2014.

In 2004, Union Pacific entered into a voluntary cleanup agreement with DTSC. DTSC is the lead agency that regulates and monitors contamination that is present on properties and is responsible for monitoring the soil conditions and overseeing any work that takes place on Parcels 12 and 13. The DTSC website is: [www.dtsc.ca.gov](http://www.dtsc.ca.gov). Some of the background information in this report, including information in these introductory paragraphs, was taken from the DTSC website.<sup>1</sup>

Phase I and Phase II environmental reports were prepared, and Union Pacific conducted detailed site characterization sampling in 2006 and 2007, including sampling of nearby soils outside of the Property. Analytical results from soil samples that have been collected indicate that arsenic is present at elevated concentrations throughout the Parcels down to approximately forty-five feet below ground surface (bgs). Most of the highest concentrations are within the top two feet along the location of the old railroad line. Groundwater is located at approximately sixty feet bgs, and sampling shows that it does not appear to be affected.

Earlier this year, Union Pacific submitted a draft Removal Action Workplan (“RAW”), which would include the excavation and removal of some of the arsenic-contaminated soil.<sup>2</sup> Under the draft RAW, the remaining amounts of arsenic-contaminated soil would be left in place and

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<sup>1</sup> The information on the DTSC website about the Parcels, which are referred to as Lots 12 and 13, is available to the public.

<sup>2</sup> A copy of the RAW currently is on file in the City Clerk’s Office, and a copy previously was located in the City Library for public review.

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managed under an agreement to restrict future uses of the Property. DTSC set an initial deadline in July for public comments, and later extended that deadline to August 2015. Given the number of public comments, including comments submitted by the current property owner and the City, DTSC determined not to proceed with consideration of the draft RAW. As of this time, no plan or timeline for remediation of the Property has been finalized or approved by DTSC.

### **Background Regarding Maintenance of the Parcels:**

Commencing in 2010, the City raised concerns with the then-owner/operator of the BHLC about the maintenance of the Property, and the failure to comply with the requirements of the Beverly Hills Municipal Code (Sections 5-7-3 and 5-7-4). The compliance issues pertained primarily to the presence of weeds, vegetation and debris on the Property and damage to the fencing, which appears to have been caused primarily by falling limbs and vehicles hitting the fence. In response to those concerns, BHLC posted a bond with the City in the amount \$20,000 and agreed to have a covenant recorded against the Property that established its obligation to maintain the Property in accordance with a maintenance plan, which had been approved by the City.

The covenant and maintenance plan, which were finalized in 2011, required BHLC to fence the Properties, in accordance with a City-approved fencing plan, and to maintain the Properties and the adjacent City-owned unimproved street rights-of-way in accordance with the requirements of the Municipal Code, so that they are kept free of litter, debris, rubbish and weeds. The covenant was executed on behalf of BHLC on November 17, 2011, and it was recorded with the County Recorder's Office on December 27, 2011. The obligations of the covenant "run with the land," meaning that they bind all successive owners of the Property, until such time that a subsequent document rescinding the covenant is recorded.

As part of the maintenance plan, BHLC was required to submit a landscaping plan, which included irrigation, for review and approval by the City. The covenant and the maintenance plan (Exhibit B to the covenant) require BHLC to maintain the hedges located on the Parcels "in a healthful and lawful condition" by "regular feeding, watering and trimming." The maintenance plan also required BHLC to maintain "all other vegetation and trees that are on the SUBJECT PROPERTIES and adjoining public rights of way free of prohibited conditions at all times." However, it is important to note that Footnote 1 in the Maintenance Plan states:

"The City and not BHLC shall maintain trees located within public street rights-of-way that are adjacent to Lot Nos. 12 and 13. The City shall also be responsible to remove debris on the SUBJECT PROPERTIES that results from those trees, provided BHLC gives the City access thereto."

In summary, BHLC is required to maintain the portions of the City street rights-of-way that are located on the Parcels free from trash and debris, in addition to maintaining the privately-owned portions of the Parcels in accordance with the requirements of the Municipal Code. If trees located on the private portions of the Parcels are hazardous, it is the responsibility of the property owner to eliminate the hazards. However, if trees located on the City street rights-of-way are found to be hazardous, the City must address those conditions. The covenant and maintenance plan do not address the situation when a tree is located on both the City street right-of-way and the privately owned portion of the Parcels.

**State and City Laws Regarding the Ownership and Removal of Trees:**

There are two California Civil Code Sections that address the ownership of trees. Basically, the ownership depends upon the location of the tree trunk. If the trunk of a tree is located entirely on one parcel, it belongs to the owner of that parcel, even if roots subsequently extend onto another parcel (Section 833). On the other hand, Section 834 states that if a tree trunk straddles a property line, which includes growing onto another property after it was planted, the owners of both properties own the tree. The Civil Code sections are set forth as follows:

“833. Trees whose trunks stand wholly upon the land of one owner belong exclusively to him, although their roots grow into the land of another.

“834. Trees whose trunks stand partly on the land of two or more coterminous owners, belong to them in common.”

An ALTA survey, dated December 14, 2014, which was prepared for BHLC, demonstrates that many of the trees that were removed from the North side of Parcels 12 and 13 had trunks that were located partially within the unimproved portion of the Santa Monica Boulevard street right-of-way. That means that those trees were owned by both the City and BHLC.

The Beverly Hills Municipal Code does not contain any provisions requiring a permit from the City to remove trees from privately owned properties that are not located in single-family residential zones. (The Municipal Code requires a permit be obtained from the City to remove certain trees from privately-owned, properties in single-family residential zones.)<sup>3</sup> As was discussed above, Parcels 12 and 13 are not located within a single-family residential zone. Instead, they are located within the Transportation (T-1) Zone. Accordingly, they are not subject to the tree removal requirements of Article 29, Section 10-3-2901.

However, the City does have a public process that it follows before hazardous trees are removed from City street rights-of-way. To briefly summarize, notice of the proposed tree removal is provided to the owner of the underlying property where the tree is located. If a City street tree master plan requires several trees to be removed and replaced, property owners on that street will be notified. In addition, one or more meetings are conducted with interested persons to inform the public about the trees that are to be removed and the reason for their removal, and public input is requested about the species of the replacement trees that will be planted.

**Background Regarding the Trees Located on Parcels 12 and 13:**

On April 10, 2015, a tree that was located on Parcel 13 fell and hit an automobile travelling eastbound on Santa Monica Boulevard.

Ashley Consulting Arborists prepared a report on behalf of BHLC, dated August 22, 2015. The report concluded that many trees located on the Parcels should be removed, particularly the Chinese Elm trees and the Eucalyptus trees that are located on the North side of the Parcels adjacent to Santa Monica Boulevard.

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<sup>3</sup> Section 10-3-2901 requires a permit to remove certain trees from single-family residentially-zoned parcels. The City's tree preservation ordinance applies only to those trees that are located on single-family residential properties and are classified as a Native Tree, a Heritage Tree, or an Urban Grove (as defined by BHMC §10-3-2900).

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The report was provided to the City Arborist on October 2, 2015. On October 6, 2015, the City Arborist sent an email to the Director of Community Services stating that the City Arborist generally agreed with the majority of the Arborist's August 22<sup>nd</sup> report and concurred that many of the Eucalyptus trees on the property were hazardous. The report identified any trees that were in close proximity, or in contact with a street curb on the south edge of North Santa Monica Boulevard as being especially hazardous. The email from the City Arborist stated that he believed that the Eucalyptus trees should be removed from the property and that any tree that has a trunk or buttress roots growing in contact with the street curb also should be removed.

On October 15, 2015, the City Arborist sent another email to the Director of Community Services recommending the removal of some of the trees, but retaining others so that there will continue to be some visual buffering for the adjacent residents. The City Arborist recommended that:

- All trees growing on the property line of the north edge of Parcels 12 and 13 should be removed.
- All trees in the southernmost row of the double row of Eucalyptus trees along the south edge of Parcel 13 should be removed.
- Any remaining trees that lean to the south in the interior of the south side of Parcel 12 should be removed.

On October 23, 2015, City representatives, including the City Manager, the Deputy City Manager/Director of Capital Assets, and the Director of Community Services met with the property owner and his attorney to discuss the tree trimming and removal plan and to explore the temporary use of Parcel 12 by the City as a staging area during the Santa Monica Boulevard reconstruction project. At this meeting, City representatives described the process the City follows for removal of City-owned trees, including public notice and meetings with neighbors, and that the City trees located on the south side of Parcel 13 would require this process.

On October 29, 2015, the City Arborist met with the property owner to provide him with the City Arborist's comments and to walk the Parcels to determine what impact carrying out the October 15th plan would have. Even though none of the trees located within the Civic Center Drive street right-of-way on the southern portion of Parcel 13 were to be removed immediately, a particular subject of the discussion was which trees would be left in the second row of Eucalyptus trees on that portion of Parcel 13, once the southernmost row of trees was removed. It was determined that approximately twenty-five of the current forty-seven trees in the northernmost double Eucalyptus row would remain after removing the trees that lean to the south and the trees that show obvious sign of decay fungi. With the loss of the entire outer southern row, and reducing the height of the remaining trees so that they will be unable to fall into the roadway, the property owner expressed concern about how the remaining trees will appear to the public, both in terms of their physical appearance and their value as a buffer both visually and for noise from North Santa Monica Boulevard. The property owner suggested that a row of 36-inch box trees be planted along the south side of Parcel 13 with appropriate spacing between the trees. Planting the entire southern side of Parcel 13 would require approximately fifty trees, if the trees were planted at a spacing of thirty-five feet. The property owner suggested that with the removal of the southern row of Eucalyptus trees, the current hedge material at the fence would be more open to sunlight and would grow faster, and the addition of the row of trees five feet behind the curb on the south side of the property would be the more

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appropriate solution in terms of hazard reduction and appearance to the public. The owner suggested the tree stock would be thirty-six-inch box sized tree species chosen by the City.

On November 5, 2015, the City sent an email to DTSC requesting information about planting trees on the City-owned portion of Parcel 13 and the use of Parcel 12 for a construction staging area. On November 6, 2015, DTSC replied that an asphalt cap over the areas to be used temporarily on Parcel 12 would work as an interim remedy to address the contaminated soil and during the use of the property for staging purposes. Regarding the planting of trees on Parcel 13, the determination of whether a soil management plan and the use of a hazardous materials contractor would depend upon the specific location where the trees would be planted. DTSC requested a diagram so DTSC could confirm whether these extra steps would be warranted. On November 9<sup>th</sup>, Staff sent the diagram of the tree-planting locations to DTSC. On November 17<sup>th</sup>, the City inquired about the status of DTSC's review. In an email from DTSC, dated November 18<sup>th</sup>, DTSC advised the City that a soil management plan and a hazardous materials contractor would be needed to plant replacement trees on Parcel 13. DTSC also indicated that they probably would hold another public meeting, and that DTSC would prefer that Union Pacific take the lead on the clean-up of the Parcels.

On November 18<sup>th</sup>, City Staff advised the property owner of the timeline for planting replacement trees required by DTSC. The property owner advised the City that they planned to proceed with tree removal pursuant to their discussions with DTSC.

In a memorandum dated November 20, 2015, the Director of Community Services apprised the City Manager about the hazardous condition of the trees and that the City Arborist generally had concurred with the recommendations set forth in the August 22<sup>nd</sup> report that had been prepared for BHLC. The property owner offered to incur the costs of removing the trees within the Civic Center Drive street right-of-way that were deemed unsafe. The memorandum from the Director of Community Services stated that the City was considering initiating the process to remove City trees that had been deemed unsafe within the next 45-60 days. The memorandum also stated that the City understood that public outreach and a notification process would occur before City-owned trees would be removed.

The November 20<sup>th</sup> memorandum also states that the City had consulted with DTSC about the process to plant trees and that the City intended to comply with their guidelines for planting replacement trees. The memorandum states that there is no need or intention to grind the stumps or roots when removing the trees and that there will be no soil disturbance. As a result, the memorandum concludes that DTSC did not have concerns regarding the tree removal process.

There is an erroneous conclusion in the November 20<sup>th</sup> memorandum to the City Manager. The memorandum states that other than the trees that are located on the twenty-foot wide City street right-of-way for Civic Center Drive that is located on the south side of Parcel 13, which are City-owned, the other trees are privately owned. However, as discussed above, the ALTA survey demonstrates that many of the trees that were removed from the North side of the Parcels actually were located partially on the Santa Monica Boulevard street right-of-way, so they were owned jointly by both the City and BHLC.

## **DISCUSSION**

### **The Removal of the Trees from the North Side of Parcels 12 and 13, which Occurred on Saturday November 21<sup>st</sup> and Sunday November 22<sup>nd</sup>.**

Based on conversations among the property owner and his attorney and representatives of West Coast Arborists<sup>4</sup>, and a separate conversation between the Assistant City Attorney and representatives of West Coast Arborists, Staff understands the following actions were undertaken by West Coast Arborists on behalf of BHLC on November 21<sup>st</sup> and 22<sup>nd</sup>:

West Coast Arborists began work on Parcel 12 on the morning of Saturday, November 21, 2015 around 8:00 a.m. West Coast Arborists coned-off areas of Santa Monica Boulevard adjacent to Parcel 12 and put out a digital traffic sign to advise motorists of the closure of the traffic lane. West Coast Arborists stated that the process that was used to close the traffic lane was consistent with the traffic work plan that West Coast Arborists typically would have used for work that it performs for the City. However, West Coast Arborists did not obtain permits from the City that should have been obtained to close the traffic lane and to work on the weekend.

West Coast Arborists was instructed by the property owner's representatives that the trees were to be cut above the soil line and that they were not to remove any stumps or disturb the soil. According to West Coast Arborists, their team was provided personal protective gear including hard hats, protective eye wear, ear plugs, gloves, leg chaps (principally for use when cutting) and masks. They also had a water truck that was located about a block from the work site to use in the event that dust was generated. Representatives from West Coast Arborists stated that they did not use the water truck because they did not observe any dust generated by the work.

The West Coast Arborists team initially proceeded from the westerly end of Parcel 12 to about Elm Drive on Saturday, November 21, 2015, completing the tree cutting and most of the debris removal from that area of Parcel 12. Also on Saturday, West Coast Arborists cut trees on Parcel 13. Debris removal on Parcel 13 was partially completed on Saturday around 4:00 p.m.

On Sunday morning, November 22, 2015, West Coast Arborists started work around 8:30 a.m. and completed the eastern half of Parcel 12. The remaining debris removal was completed around 3:30 p.m. Based on this description of the work, it does not appear that work was performed on Sunday immediately adjacent to the Farmers' Market. This description of the work coincides with the recollection of a City Staff member who was present throughout the Farmers' Market on November 22<sup>nd</sup>.

West Coast Arborists stated that most of the equipment was staged on Santa Monica Boulevard, and tree cutting generally took place from the staged areas on the street. Trees generally were cut by first removing major limbs and lowering the limbs by rope to the ground. Then, the major trunk was removed cutting the tree above the soil line. Most of the limbs were placed on the adjacent street. Limbs and trunks that were on the surface of Parcels 12 and 13 were removed by a rubber-tired loader with a claw. The claw would pick up the limbs and trunks and place them across the fence into a debris container that was parked on the street. No chipping was done during the tree removal process.

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<sup>4</sup> Some of the information in this section is based upon an email from the property owner's Attorney, George Mihlsten, which was sent to the City on Friday, December 10, 2015.

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West Coast Arborists stated that they removed thirty-two trees from Parcel 12 and sixty-three trees from Parcel 13 (a total of ninety-five trees). Measurements taken by City Staff last week from the curb along Santa Monica Boulevard to stumps located on the parcels indicate that thirty-nine trees were removed from Parcel 12. Of those thirty-nine trees, none of the trees were located entirely within the street right-of-way, and fifteen trees were located partially within the Santa Monica Boulevard right-of-way. The rest of the trees were located entirely on the privately-owned portion of Parcel 12. The Staff measurements also indicate that fifty-seven trees were removed from Parcel 13, and of those trees, no trees were located entirely within the street right-of-way, and twenty-seven trees were located partially within the Santa Monica Boulevard right-of-way with the remaining trees located on the privately-owned portion of that Parcel.<sup>5</sup>

### **Actions by DTSC and the City Following the Removal of the Trees.**

On November 25, 2015, DTSC issued a cease and desist order to BHLC requiring that no further work be done on the Parcels without prior DTSC approval.

On December 2, 2015, Norm Dupont, an environmental expert from the City Attorney's office, contacted Mr. Tedd Yargeau at DTSC to request a copy of the cease and desist letter and to ascertain whether the Farmers' Market could still be conducted at its usual location near Parcels 12 and 13. In particular, Mr. Dupont's email stated:

"Given the property owner's recent removal of trees on Lots 12 & 13, which may have disturbed arsenic-contaminated soils, the City wants to make sure that DTSC does not have any health concerns about this Sunday's (or any future Sunday's) farmer's market. In particular, the City wants to ensure that it avoids possible exposure of the public, including vendors and market shoppers, to arsenic. Due to the upcoming farmer's market this Sunday, it is imperative that DTSC advise the City if DTSC has any such concerns so that we can discuss appropriate next steps with the City."

In response to Mr. Dupont's email, Mr. Yargeau telephoned Mr. Dupont on December 3, 2015, and advised him that unless there was a repetition of the movement of earth that might lead to air exposure issues, DTSC would not anticipate any current (lingering) problems. The City Attorney's Office advised Staff of that information, and a City press release was prepared that reflected the information that had been received from DTSC. In addition, Mr. Dupont sent a letter to the attorneys for the property owner emphasizing that the City expects that the owner will comply with DTSC's cease and desist order and with the City's requirements to obtain the appropriate permits to perform work in the City, including an after-hours and a permit to close lanes within the City's street rights-of-way. Based on the information from DTSC and the prior statement from the property owner's attorneys that the tree removal work on the parcels had been completed, it appeared that the Farmers' Market could be held at the usual location on December 6, 2015.

However, later that same day (December 3<sup>rd</sup>), Mr. Yargeau telephoned Mr. Dupont and advised him that due to the removal of vegetation, DTSC had concerns about dust emanating from the Property and its potential impact on the Farmers' Market. Mr. Dupont immediately called Mr. Yargeau again and advised him that if DTSC had concerns, then DTSC needed to give specific

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<sup>5</sup> West Coast Arborists states that they removed a total of ninety-five trees from the Parcels, and the City measurements reflect a total of ninety-six trees. However, it is likely that the City measurements included the stump of a tree that was removed previously.

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direction to the City about the Farmers' Market and about what measures should be taken on, or in the vicinity of, the Property, since residential properties are located near Parcels 12 and 13. Mr. Yargeau stated that the property owner needed to take action to replace or repair the existing fence and spray both Parcels with a binding substance, such as Soil-Sement<sup>6</sup> to prevent dust from leaving the Parcels. Mr. Yargeau subsequently sent an email to the property owner's attorney advising BHLC of the DTSC directives.

Soil Testing By City Consultant. The City retained Rincon Consultants, Inc. ("Rincon") to conduct tests on soil samples taken on and adjacent to the Parcels. One set of samples was taken on December 3<sup>rd</sup> from dirt located on Civic Center Drive immediately adjacent to Parcels 12 and 13. The second set of samples was taken on December 4<sup>th</sup> from soil located on the surface of the two Parcels.<sup>7</sup> The purpose of the soil sampling was to determine whether dirt that might contain arsenic particles had migrated off the Parcels as a result of the recent tree removal activities by the landowner and to determine the level of arsenic that currently is present on the surface of the Parcels.

Rincon took eight off-site soil samples and twenty soil samples on-site for a total of twenty-eight samples.<sup>8</sup> Rincon had a laboratory certified by the State of California's Environmental Laboratory Accreditation Program analyze the samples. The City received the test results on Tuesday, December 8, 2015. A copy of the laboratory reports were provided to DTSC on December 9, 2015.

Rincon's report to the City states that all of the off-site samples were below the level of 11 mg/kg ("parts per million"), a level found to be within the range of arsenic that is found generally in southern California soils. (Kearney Foundation of Soil Science, University of California Riverside Report (March 1996)). A separate study by DTSC scientists of soils located at schools of the Los Angeles Unified School District suggested that a level of 12 parts per million appeared to be a natural level in those soils. Both of these studies demonstrate that the levels of arsenic found in the dirt samples taken adjacent to Parcels 12 and 13 are below those naturally occurring, or "background," levels of arsenic. To reiterate, the arsenic level that was found on Civic Center Drive immediately adjacent to the Parcels is no higher than the level of arsenic that is generally found throughout Southern California and elsewhere in the City.<sup>9</sup>

Air Testing By Second City Consultant. The City retained a separate consultant, PCR Environmental Services ("PCR"), which took air samples at two locations over a three-day period, one upwind across the Parcels and the other downwind, to determine whether arsenic was present. Testing began on Friday, December 4<sup>th</sup>. PCR was directed to take air samples from the City's Public Right-of-Way surrounding the Parcels and not from within the Parcels. The following was the schedule for the air monitoring:

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<sup>6</sup> Staff has been advised that Soil-Sement® is a strong acrylic co-polymer that is diluted with water for application and is used for dust and erosion control and soil stabilization. Many factors influence the longevity and maintenance intervals of the product. They include soil type, climate, construction method, and type and amount of traffic. Typically, applications are designed to last three to six months.

<sup>7</sup> The City had obtained the property owner's permission to have Rincon take samples from the privately-owned portions of the Parcels, and the samples were taken before the Soil-Sement was sprayed on the Properties.

<sup>8</sup> The reports from Rincon and a map depicting the on-site and off-site testing locations are attached to this report.

<sup>9</sup> Based on the results of the off-site dirt samples, on December 4, 2015, Rincon advised the City that: "the dust inhalation risk would be similar to any area within the City of Beverly Hills."

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- Friday, December 4<sup>th</sup>: Set up monitors and start sample collection throughout three concurrent days – Saturday, December 5<sup>th</sup>; Sunday, December 6<sup>th</sup> and Monday December 7<sup>th</sup>. Monitors were set up both upwind and downwind of the Parcels.
- Tuesday, December 8<sup>th</sup>: The monitors were picked up and brought to the laboratory.
- Thursday, December 10<sup>th</sup>: Laboratory results were available for review.

The City received the results of the air monitoring tests on December 10, 2015. The laboratory determined that no detectable levels of arsenic were present in either the upwind or downwind samples.<sup>10</sup>

PCR also conducted six (6) wipe tests from fencing and other solid surfaces located on the Parcels and from vegetation immediately adjacent to the Parcels. Three of the samples were “upwind,” and three were “downwind.” The purpose of the wipe tests was to determine whether contaminated soil had blown off the ground onto the fence and adjacent vegetation. After testing these samples, the laboratory determined that no detectable levels of arsenic were found in either the upwind or downwind samples. The City sent the initial results from the air testing to DTSC on Thursday, December 10, 2015, and the complete laboratory report was sent to DTSC on Friday, December 11, 2015.

Adjacent Streets Cleaned. The City cleaned the streets around Parcels 12 and 13 after the Parcels had been sprayed with the Soil-Sement. Specifically, Civic Center Drive, Foothill Road and West 3<sup>rd</sup> Street were cleaned on Saturday, December 5, 2015, around 1:00 a.m., and again around 11:30 p.m. Normal Street Cleaning occurred on Sunday, December 6, 2015, around 9:00 p.m.

Permits Issued by the City to the Property Owner. On Friday, December 4<sup>th</sup>, the City issued the following permits to the property owner so the work required by DTSC could be performed:

1. An after-hours permit, which allowed property owner to perform work on Saturday December 5<sup>th</sup>, to repair the fence on the Parcels and spray them with the Soil-Sement product.
2. A Fence-Wall permit, which allowed the property owner to repair and/or replace the existing 6-foot fence on Parcels 12 & 13 and to add two 5-foot sections of fencing on Parcel 12, which had been requested by the City, so that the public could not access Parcel 12 from either end.
3. A Right of Way Use Permit, which allowed the property owner to use the right-of-way, if necessary, to repair and/or replace the 6-foot fence and install the 5 foot sections of the fence and to spray the Soil-Sement.

On Friday, December 4<sup>th</sup>, DTSC approved the work plan in writing and authorized the property owner to take these actions. BHLC subsequently repaired the fence on Parcel 13 to secure that Parcel and sprayed both parcels with the Soil-Sement.

City Work on Parcel 12. The City Manager directed Staff to have a fence installed along the curb on the North side of Parcel 12, to secure the portion of Parcel 12 that is in the street right-of-way and to avoid confusion about the ownership of the fence and the approximately two-foot wide portion of the Santa Monica Boulevard street right-of-way that is located on Parcel

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<sup>10</sup> A copy of the report from PCR dated December 8, 2015, is attached to this report.

Meeting Date: January 5, 2016

12. The City engaged the same licensed hazardous materials contractor that had been used by BHLC, American Integrated Services, to install the fence and to reapply the Soil-Sement following the installation of the fence. DTSC approved that work in writing on December 10, 2015, before the work commenced, and the work was completed on Friday, December 18<sup>th</sup>.

Farmers' Market Partially Relocated For Two Weeks on December 6<sup>th</sup> and December 13<sup>th</sup>. To ensure that none of the remedial work would affect the Farmers' Market and that the fencing and sealant had been completed, City Staff decided that the vendors who typically are located on Civic Center Drive adjacent to Parcel 12 would be moved to Third Street, so that the Farmers' Market would not be conducted immediately adjacent to Parcel 12. Once the work to fence the property and re-apply the Soil-Sement had been completed, the Farmers' Market was moved back to its prior location on December 20<sup>th</sup>.

### **Current Condition of the Parcels:**

The Parcels have been fenced and the Soil-Sement has been sprayed on the surface of both Parcels.<sup>11</sup> On the evening of December 23<sup>rd</sup> or the morning of December 24<sup>th</sup>, a car hit the fence on the north side of Parcel 13. The City has directed BHLC to repair the fence and re-apply the Soil-Sement. That work is scheduled to occur on December 29<sup>th</sup>, in accordance with DTSC's requirements.

### **Future Plans for the Parcels:**

The hazardous trees located within the twenty-foot wide street right-of-way on the south side of Parcel 13 still need to be trimmed and/or removed in accordance with the recommendations previously articulated by the City Arborist in October 2015. The City will develop a tree replacement plan for the Parcels with input from the public and the property owner, will conduct its typical public review and notification process, and will submit a work plan to DTSC for approval, before commencing or authorizing any tree replacement work.

At this time the City does not know what the owner's plans are for the Parcels, as nothing has been proposed yet to the City. As was discussed above, the property is zoned for transportation uses, so the only "by-right" use is for rail purposes. The City Council, by a vote at a duly noticed City Council meeting, could approve a parking use on the Parcels. Any other use of the Parcels would involve an application for a zoning change and associated environmental review pursuant to the California Environmental Quality Act, which would include an extensive public hearing process before both the Planning Commission and the City Council that ensures public input.

Subject to City Council authorization, City Staff recommends that the City continue to explore with BHLC and DTSC the temporary use of Parcel 12 as a construction staging area for the Santa Monica Boulevard reconstruction project. Due to its location, the use of Parcel 12 for this purpose should expedite the construction and reduce construction impacts on adjacent businesses and residents.

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<sup>11</sup> Directions were given to the contractor who applied the Soil-Sement to the Parcels that a well should be left around trees and hedges so they can continue to receive water.

**City Expenses Incurred Following the Removal of the Trees:**

The City is collecting the invoices from the consultants for the work that the City had performed to test the air and the soil. The City also is obtaining an invoice from the contractor who installed the fence and sprayed the Soil-Sement on Parcel 12 for the City. It appears that these expenses total approximately \$40,000. City Staff intend to submit the invoices and a request for reimbursement for all of those expenses to BHLC.

**CONCLUSION:**

The mistakes that were made in connection with the removal of the trees were discussed at the beginning of this report as well as the recommendations that have been developed. Although mistakes obviously need to be avoided, they do provide an opportunity for analysis and improvement of City processes to ascertain the lessons that can be learned from the mistakes. The key mistake in this circumstance arose from inadequate information about the unimproved two-foot wide portion of the Santa Monica Boulevard Street right-of-way that is located on the north side of the Parcels and the law regarding the ownership of trees that straddle a property line. This resulted in the corresponding mistaken assumption that the trees that were located partially on the two-foot wide portion of the street right-of-way were privately owned. If that error had not been made, the City's typical public information and review process, which is conducted before City-owned street trees are removed, would have occurred, and the public would have been apprised of the upcoming work. Thus, even though hazardous trees still will need to be removed from City street rights-of-way, the public will be aware of the process and will not be surprised. Improved communication and coordination among the City's departments, the designation of a member of City Staff to be the point of contact regarding these Parcels, and the development of a complete data base regarding City-owned properties that is available to all City Staff (along with appropriate training) should correct this deficiency. In addition, Staff also will improve its communication with other public agencies, such as DTSC, and obtain written confirmation of any direction that is given to the City.

Second, there is a natural tension between responding promptly to the press and the public and the need to ensure that the information that is provided is completely accurate. The best approach for the City is to acknowledge when it does not know the answer to a particular question and resist the temptation to provide an immediate answer that may not be completely accurate, and to provide information promptly after it has been verified.

In closing, it should be emphasized that over the past several weeks since the trees were removed, City Staff remained focused on the City's primary goal of protecting the public health and the safety of residents, visitors and businesses, despite other potential distractions. Staff immediately undertook numerous steps to determine the level of the risk from the soils on the Parcels and the tree removal, and to mitigate that risk by fencing the Parcels and spraying them with Soil-Sement. Staff also retained independent consultants who tested the air and soil, both on and off the Property. The test results after the removal of the trees indicate that there is no current risk to the community from being in the vicinity of Parcels 12 and 13, which is the most important information for the City community.

  
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Carol Lynch, Assistant City Attorney